BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHT G(W)118495-76M BY STONE)
CONTAINER CORPORATION)

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On January 30, 1992, the Department Hearing Examiner submitted a Proposal for Decision in this matter. The Proposal recommended granting the subject Application. A timely written exception was received from the Applicant. Objectors Leo Morin, Eugene R. Starlin, Steven W. Morin, Leroy Wolff, Wayne Toulouse, Harland H. Heller submitted a timely written response to the exception which they all signed. The Applicant did not request an opportunity to present oral arguments on their exception.

The exception deals specifically with a proposed condition, item #6 on page 23 of the Proposed Order, which states that "the combined flow of the Fairbanks Well Field shall not exceed 14,500 gpm." The Applicant asserts that the 14,500 gpm was the current production rate of the Fairbanks Well Field and 16,000 gpm is the total proposed rate. The Fairbanks Well Field intended yield and the mill supply line is 16,000 gpm. The subject application of transferring 2,000 gpm from the old near-mill well field to the Fairbanks Well Field is to be operated in conjunction with the current six deep wells at 1,929 gpm, one at 1,500 gpm, and one at 1,000 gpm not to exceed a total withdrawal of 16,000 gpm.

The subject Application is described in the Findings as a change in point of diversion of a water right from a previously operated well in a near-mill well field to the Fairbanks Well Field. The Applicant proposes to change 2,000 gpm up to 3,226.01 acre-feet per year of the water right evidenced by Statements of Claim W118495-76M, W118496-76M, and W118497-76M to the new well field area called the Fairbanks Well Field.

The record and Findings support the Applicant's contention that the total maximum withdrawal from the Fairbanks Well Field was to be 16,000 gpm. Proposed Finding of Fact 9 describes the drawdown of the local surface aquifer and the local deep aquifer by pumping in the Fairbanks Well Field at 14,500 gpm, and then the additional drawdown in each aquifer because of the addition of the 2,000 gpm withdrawal proposed in the Application. The information presented clearly indicates an intended maximum pumping rate of 16,000 gpm, if the Application is approved.

The total appropriation of 16,000 gpm from the Fairbanks Well Field is supported by Proposed Finding of Fact 8 describing the Fairbanks Well Field and the current pumping rates. The Proposed Finding and the record indicated that the additional well would augment the current production from the well field because of wear and other mechanical difficulties in withdrawing the maximum rate of 16,000 gpm.

The Objectors argue the facts that the power was disconnected at the well in approximately 1984 and the use was discontinued constitute abandonment of the underlying water

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rights. Finding of Fact 11 states that the disconnection of power in 1985 was to assure that surface contamination was not induced into the deep water aquifer. It is clear from the record that because of the loss of efficiency of the remaining wells and the wear on their motors and pumps it is now necessary to add an additional well and pump to the Fairbanks Well Field. Disconnecting the power and the loss of efficiency over a seven year period does not constitute abandonment of the water rights involved.

The Applicant argues in his exception that use records from February 1984 through March 1990 indicate an average 24 hour rate of 15,100 gpm. This is new evidence not in the record and cannot be considered at this stage. Regardless the record is clear the intended total appropriation is 16,000 gpm for the purpose of this Application.

I therefore conclude based upon my review of the record and arguments in this matter that the Hearing Examiner erroneously used 14,500 gpm instead of 16,000 gpm in Condition #6 on page 23 of the Proposal for Decision. The Findings clearly show the intended total appropriation from the Fairbanks Well Field to be 16,000 gpm. Therefore, Condition #6 shall be revised to state a limit of 16,000 gpm.

Having given the exception full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision and incorporates them

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herein by reference. Based upon the Findings of Fact and Conclusions of Law, all files and records herein, and the exceptions, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right G(W)118495-76M is hereby granted to Stone Container Corporation to change the point of diversion of Statements of Claim 118495-76M, 118496-76M, and 118497-76M from the NW¼NE¼NW¼ of Section 24, Township 14 North, Range 21 West to the SE¼SE¼SW¼ of Section 25, Township 14 North, Range 21 West, in Missoula County.

1. This authorization is subject to all prior existing water rights in the source of supply. Further; this authorization is subject to any final determination of existing water rights, as provided by Montana law.

2. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

3. This authorization is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the

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flow of the water may be stopped when not being put to beneficial use.

The final completion of the well must include an access port of at least .50 inch so that the static level of the well may be accurately measured.

4. The approval of this change is not to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and Section 85-2-404, MCA.

5. Pursuant to Section 85-2-505, MCA, to prevent ground-water contamination, an operational backflow preventer must be installed and maintained by the Appropriator if a chemical or fertilizer distribution system is connected to the well.

6. The maximum diversion rate from the well shall not exceed 2,000 gallons per minute, or when combined with other supplemental wells in the Fairbanks Well Field shall not exceed a rate that causes the total withdrawal from the Fairbanks Well to exceed 16,000 gpm.

7. This authorization is subject to the condition that the Appropriator shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Missoula Water Resources Regional Office, Holiday

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Village Professional Plaza Suite 105, P.O. Box 5004, Missoula, MT 59806.

8. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

9. The water rights involved in this Authorization to Change are multiple uses of the same right. The use of the right for several purposes does not increase the extent of the water right. Rather, it allows the right to interchange the purpose of use of the water in accord with historic practices.

10. If, at any time after this authorization is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Appropriator to show why the authorization should not be modified or revoked. The Department may then modify or revoke the authorization to protect existing water rights or allow the authorization to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

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NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 1 day of June, 1992.

Laurence Siroky,
Assistant Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 1ST day of June, 1992, as follows:

Stone Container Corp
Drawer D
Missoula, MT 59806

Eugene R. Starlin
14125 Harper Bridge
Missoula, MT 59802

Leo L. Morin
Marie A. Morin
5920 Lavoie Ln
Missoula, MT 59802

LeRoy V. Wolff
13228 Harpers Bridge Rd.
Missoula, MT 59802

Wayne L. Toulouse
13380 Harpers Bridge Rd.
Missoula, MT 59802

Harland H. Heller
13001 Moccasin Lane
Missoula, MT 59802

Michael P. McLane, Manager
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806
(Via Electronic Mail)

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Steven W. Morin
Janice L. Morin
13555 Harper Bridge Rd.
Missoula, MT 59802

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301

Cindy G. Campbell
Hearings Unit Legal Secretary

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT G(W)118495-76M BY STONE CONTAINER CORPORATION	))))	PROPOSAL FOR DECISION

* * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on December 4, 1991, in Missoula, Montana, to determine whether the above Application should be granted to Stone Container Corporation under the criteria set forth in § 85-2-402(2), MCA.

APPEARANCES

Applicant Stone Container Corporation (Stone or Applicant) appeared by and through Larry Weeks, Technical Director.

Garry Grimestad, Consulting Hydrologist, appeared as a witness for the Applicant.

Steven W. and Janice L. Morin appeared at the hearing by and through Steven W. Morin.

LeRoy V. Wolff appeared at the hearing pro se.

Eugene R. Starlin appeared at the hearing pro se.

Leo L. and Marie A. Morin appeared at the hearing by and through Leo L. Morin.

Michael P. McLane, Manager of the Department of Natural Resources and Conservation's (Department) Missoula Water Resources Regional Office, appeared at the hearing.

Wayne L. Toulouse and Harland H. Heller did not appear at the hearing nor had they made previous arrangements with the Hearing Examiner; therefore, in accordance with ARM 36.12.208, they are in default, their objections are dismissed and they no longer have status as parties.

EXHIBITS

Before the hearing commenced, Michael McLane made photocopies of an aerial photograph in the possession of Larry Weeks. Mr. McLane brought an original aerial photograph and photocopies of it to the hearing. During the hearing both photocopies were used to show locations of the Applicant's proposed well and the proximity of the Objectors' wells. It was agreed at the hearing that these photocopies would be entered into the record as Exhibits 1 and 2.

Exhibit 1 is a photocopy of an aerial photograph which has been enhanced to show the location of Stone's proposed well, Objector Wolff's well and Objector Starlin's property and wells.

Exhibit 2 is a photocopy of an aerial photograph which has been enhanced to show the location of Stone's proposed well, the location of the well to be abandoned, Leo Morin's well, and Steven Morin's well.

The Department file was made available for review by all parties who had no objection to any part of it; therefore, it is entered into the record in its entirety.

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The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Section 85-2-402(1), MCA, states, in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter.

2. On November 5, 1990, Stone filed an Application for Change of Appropriation Water Right to change the point of diversion of Statements of Claim 118495-76M, 118496-76M, and 118497-76M. The proposed diversion, a new well to be located in the $SE\frac{1}{4}SE\frac{1}{4}SW\frac{1}{4}$ of Section 25, Township 14 North, Range 21 West, in Missoula County[1], would be located approximately two miles south of the old diversion which is a well located in the $NW\frac{1}{4}NE\frac{1}{4}NW\frac{1}{4}$ of Section 24. The well at the old point of diversion would be abandoned following the prescribed procedures to be certain that no contamination from surface seepage would enter the well. (Exhibit 2, Department file, and testimony of Larry Weeks and Garry Grimestad.)

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[1]Unless otherwise specified all land descriptions in this Proposal are in Township 14 North, Range 21 West, Missoula County.

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3. Pertinent portions of the Application were published in The Missoulian on July 24, 1991. Six timely objections to the Application were received by the Department. (Department file.)

4. Stone Brown Papers, Inc. and Stone Container Corporation are one and the same. Champion International Corporation, predecessor of Stone Brown Papers, Incorporated, filed Statements of Claim W118495-76M, W118496-76M, and W118497-76M as well as several other statements of claim. A Water Right Transfer Certificate was filed with the Department by Champion International Corporation on August 12, 1986, transferring certain water rights including the three mentioned above to Stone Brown Papers, Incorporated. However, nothing has been done to change the Department's ownership records of the filed Statements of Claim from Stone Brown Papers, Incorporated to Stone Container Corporation.[2] (Department files, Department records, and testimony of Larry Weeks.)

5. Statements of Claim W118495-76M, W118496-76M, and W118497-76M all claim the same means of diversion, a well located in the $NW\frac{1}{4}NE\frac{1}{4}NW\frac{1}{4}$ of Section 24, called Well No. 6, located in the Mill Well Field. Each claims a priority date of August 12, 1961. Each claims a place of use in the $E\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}$ of Section 14. Statement of Claim W118496-76M claims an appropriation of 2,000 gallons per minute (gpm) up to 3234.30 acre-feet of groundwater

[2]A transfer certificate need not be filed to change the name on Stone's water rights; however, they should notify the Department that the name has been changed so that all the water rights will be in the same name.

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per year for fire protection. Statement of Claim W118495-76M claims to appropriate 2,000 gpm up to 3244.4 acre-feet of groundwater per year for industrial use. Statement of Claim W118497-76M claims to appropriate groundwater at a flow rate of 2,000 gpm up to 3234.30 acre-feet for power generation. All three Statements of Claim have claimed volumes which cannot be attained with the claimed flow rates. Pumping at 2,000 gpm 24 hours a day 365 days of the year will produce 3226.01 acre-feet. It appears Stone is aware of this inconsistency because it stated in the Application for Change of Appropriation Water Right that it was proposing to change 2000 gpm up to 3226.01 acre-feet per year of the aforementioned water rights. (Department file and records.)

6. Stone has two well fields. The Mill Well Field which consists of four wells and the Fairbanks Well Field which consists of eight wells. The water pumped from these well fields is piped to two storage tanks and from there it goes into a distribution system which takes it throughout the mill. The pipeline leading into the mill has a capacity of 16,000 gpm. Records from the integrators are kept daily to record the times the wells are used. That information is used to estimate the amount of water used. However, those records are kept for only two years, then discarded. (Testimony of Larry Weeks.)

7. Stone retained Garry Grimestad to develop a prediction of the hydrologic consequences of the proposed change. Mr. Grimestad has been working on aquifer predictions around the mill

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site since 1974. Some of the information used for this prediction has been developed over the years, but more precisely the predictions are based on the testing of the proposed well site by developing and pumping a six-inch test well at the location of the proposed production well in January of 1990. Using the best information available and a U.S. Geologic Survey computer model which is a fairly standard groundwater model, Mr. Grimestad was able to define certain hydrological characteristics of the area.

The vertical profile of the area consists of three layers: the top layer is a shallow water table approximately 30 feet deep along the Clark Fork River; underlying that is fine-grained lake-derived sediments from 80 feet to 100 feet thick; beneath that is a highly productive gravel system which is approximately 30 feet thick locally; and under that is bedrock. All of Stone's wells are in the lower highly productive system but that system is recharged vertically through the fine-grained sediments from the shallow aquifer which in turn draws from the Clark Fork River.

There are obviously drawdowns associated with the proposed change, but the drawdowns stabilize rather quickly and become fairly predictable. These drawdowns are somewhat limited compared to what they might otherwise be because the influence of pumpage intersects the Clark Fork River. That does not mean there is no effect due to the change. However, as long as the river is present and flowing it becomes the major source of the

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water produced and a steady state situation is reached rather rapidly. (Testimony of Garry Grimestad.)

8. Stone's Fairbanks Well Field consists of eight wells which should produce a combined current rate of 14,500 gpm. However, one of the wells is operating at half capacity due to mechanical problems and two others are operating at approximately 20 percent below design. Moving the water right for Well No. 6 would not increase the burden on the source. With the proposed deep well, the total pumpage would not exceed the previous usage. (Department file and testimony of Larry Weeks and Garry Grimestad.)

9. Using the information obtained from the test pumping, Mr. Grimestad prepared four maps. Map 1 shows the estimated drawdown in feet of the surface aquifer caused by pumping Stone's Fairbanks Well Field at the current production rate of 14,500 gpm. The estimated drawdown is approximately five feet at and near the Fairbanks Well Field. At a distance of approximately three miles, the estimated drawdown is one-half foot. This is a secondary effect caused by the lower system being pumped, which induces vertical flows from the shallow system which in turn draws its recharge from the Clark Fork River.

Map 2 shows the estimated drawdown in feet of the deep aquifer caused by pumping Stone's Fairbanks Well Field at the current production rate of 14,500 gpm. The estimated drawdowns in the immediate area of the production field are quite a bit more because this is the system that is physically being pumped

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and the deep system does not intersect the river. The deep system is recharged only by the shallow aquifer.

Map 3 indicates the estimated water level changes in the shallow aquifer as a result of moving the water right for Well No. 6 from the old Mill Well Field to the Fairbanks Well Field. The water level lowering at and near the Fairbanks Well Field would be six-tenths of a foot. At a distance of one-half mile from the well field, the water table reduction would be four-tenths of a foot. At approximately seven-eights of a mile north of the proposed well site there would be no change in the water level. At approximately one mile north of the well field, the water level would rise about two-tenths of a foot increasing gradually as the distance gets further from the Fairbanks Well Field until the water level at the old Well No. 6 site would rise approximately one and one-half feet.

Map 4 indicates the estimated change in feet in the deep aquifer as a result of moving Well No. 6 from the Mill Well Field to the Fairbanks Well Field. At the Fairbanks Well Field there would be a decline of three feet. At a distance of approximately three-eighths of a mile, the decline would be one-half foot. At a distance of approximately five-eighths of a mile, there would be no change in the water level. At a distance of approximately one mile the water level in the deep aquifer would rise approximately one-half of a foot, increasing with the distance until the water level at the old Well No. 6 site would rise three feet.

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The "no change" lines on Maps 3 and 4 have been imposed by the cessation of pumpage in the area of the old Well No. 6 and the initiation of pumpage at the proposed change site near the Fairbanks Well Field. The water levels would decline at the new site and rise at the old site so at some point between the two there would be no change as shown on Maps 2 and 3. (Department file and testimony of Garry Grimestad.)

10. To obtain reasonable background conditions, a number of things were assumed in the groundwater model, e.g., reasonable recharges over the area, runoff from the mountains, and runoff from O'Keefe Creek. Runoff from O'Keefe Creek significantly recharges the shallow aquifer. In a drought situation when there would be no runoff from O'Keefe Creek, the entire draw to recharge the shallow aquifer would be made on the Clark Fork River. As long as the river is flowing, there would be little or no difference in the aquifer. (Testimony of Garry Grimestad.)

11. In 1984, certain persons employed by Stone were notified not to use Well No. 6 except in emergency situations because the well was contaminated. Well No. 6 was disconnected from its power source on January 30, 1985. Well No. 6 is located next to the chip pile. Seepage from the chip pile and from the settling ponds have contaminated the well. (Testimony of Steve Morin and Larry Weeks.)

12. The proposed well site is up-gradient from the Mill Well Field and Well No. 6. The natural groundwater flow of the aquifer systems is toward the Clark Fork River in a general

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northwesterly direction. There are monitoring wells in the deep aquifer between the Fairbanks Well Field and the Mill Well Field. These wells have been in and monitored since the mid 1970's. There has never been any sign of contaminants being drawn back up-gradient by pumping the Fairbanks Well Field. That well field is not impressing that much difference to reverse the natural gradient flow and physically pull contaminants into the wells from a location two miles down-gradient.

13. If Well No. 6 is moved to the new site, with reduced pumping at the Mill Well Field over a period of time, there would be a decrease in the contaminants being drawn into the system. If there were no wells operated at the Mill Well Field, the contaminants would move toward the river in the shallow system, without entering the deep aquifer, and the system would eventually cleanse itself.

14. There are sloughs in the area that now go dry when in the past, there was water in them all year. The wells in the Fairbanks Well Field do affect the water level of the shallow aquifer; however, sloughs tend to be "armored"[3] on the bottom and during most of the year there is a separation between the actual groundwater and the water level in the sloughs which become sort of a perched system. On September 11, 1991, Mr. Grimestad and Mr. Weeks measured, at the proposed point of diversion, the difference in the level of the groundwater and the

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[3]The bottom of the slough becomes lined with muds and silts over the years creating a liner that while not impervious, does impede the downward movement of the water.

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bottom of the slough to be approximately five feet. While there is a natural difference due to pumpage between the shallow system and the deep system, that would amount for a difference of only one-half to one foot; thus the groundwater level is about four to four and one-half feet lower than the bottom of the slough. Mr. Grimestad and Mr. Weeks then traced the flows out of La Valle Creek and found the creek was feeding the sloughs. Although the sloughs, the shallow aquifer and deep aquifer are connected, it is not a direct connection. As long as there is a separation between bottom of the sloughs and the groundwater level, there would be no immediate effect on the sloughs if the water table were lowered. (Testimony of Garry Grimestad.)

15. There would be an effect on the groundwater system if the water right for Well No. 6 is moved to the Fairbanks Well Field. The change would draw down the groundwater level approximately four-tenths to six-tenths of a foot in the shallow aquifer in Objector Starlin's area. The drawdown at the Wolff's well, Steve Morin's well and Leo Morin's well would be approximately two-tenths to four-tenths of a foot. (Department file, Exhibits 1 and 2, and testimony of Garry Grimestad.)

16. Eugene R. Starlin objected on the basis that Stone has lowered the water table by several feet since 1976 and that the lowered water table makes it hard to keep submoisture in his fields. In his written objection Mr. Starlin states that since 1976, the sloughs in his property go dry in August when they used to have water in them year around. However, in the testimony

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given at the hearing, Mr. Starlin stated that the only time there is water in the sloughs is in the spring when the water table is high. Mr. Starlin believes Stone's use of groundwater has reduced the amount of water in the slough he uses as a source for irrigation. (Testimony of Eugene Starlin and Department file.)

Last year Mr. Starlin had to pull the pipe out of his well. At that time he was able to determine from the rust on the pipe that the static water level had dropped four feet lower than it was the last time the pipe was pulled from the well which was six or seven years ago. Mr. Starlin estimates the static water level is approximately 12 feet below the surface. It is more expensive for Mr. Starlin to sprinkler irrigate now because, according to Mr. Starlin, the water goes down faster requiring more water. Mr. Starlin believes the natural water table has already lowered below the alfalfa roots and the submoisture would be lowered even further if the water right for Well No. 6 is moved to and used at the proposed site, requiring Objector Starlin to pump more water to compensate. (Testimony of Eugene Starlin.)

17. Mr. Starlin holds Permit 19697-s76M to appropriate 65 gpm up to 27.50 acre-feet per year of the waters of an unnamed tributary of the Clark Fork River at a point in the NW¼NW¼SE¼ of Section 36 to irrigate 11 acres in the SE¼ of Section 36. Mr. Starlin holds Certificate of Water Right 48111-g76M to appropriate 20 gpm up to 15.95 acre-feet per year of groundwater at a point in the NW¼NW¼SE¼ of Section 36 to be used for domestic, stock water, lawn and garden, and irrigation of 6.5

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acres. This well is approximately 30 feet deep. The places of use are in the NW¼NW¼SE¼ of Section 36. Mr. Starlin also holds Certificate of Water Right 48110-g76M to appropriate 25 gpm up to 24.53 acre-feet of groundwater per year at a point in the NW¼NW¼NE¼ of Section 36 for domestic, stock water, lawn and garden, and irrigation of 11 acres. This well is also approximately 30 feet deep. The places of use are in the NW¼NW¼NE¼ of Section 36. Mr. Starlin has filed Statements of Claim W111240-76M and W111241-76M before the Water Court. Claim W111240-76M claims 235 gpm up to 80.5 acre-feet per year of water appropriated at a point in the SE¼NW¼NE¼ of Section 36 from a "slough and springs and seepage water and Clark Fork River" for irrigation of 32 acres located in the NE¼ of Section 36. Further clarification of this claim states the source includes waste and seepage that collects in a slough, tributary of the Clark Fork River. Claim W111241-76M claims to appropriate 65 gpm up to 27.5 acre-feet per year of an unnamed tributary of the Clark Fork River at a point in the NW¼NW¼SE¼ of Section 36 for irrigation of 11 acres located in the NW¼NW¼SE¼[1] of Section 36. (Department file and records and testimony of Objector Starlin.)

18. Leo L. and Marie A. Morin based their objections on reports that numerous residences' wells in the vicinity of Stone's old well failed after previous owners of the pulp mill diverted huge amounts of underground water and they fear that the

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[1]This statement is in error. There can only be 10 acres in the NW¼NW¼SE¼ of Section 36 unless it is a government lot then the description would include the lot number.

proximity of the proposed diversion to their property could result in the failure of their water well. Leo L. and Marie A. Morin have been issued Certificate of Water Right 11931-g76M for a well completed in May of 1972. The well is located in Lot 3, Plat C in the N½NW¼SW¼ of Section 31, Township 14 North, Range 20 West. The water is used for domestic and stock water not to exceed 12 gpm up to 1.56 acre-feet per year. Leo Morin stated at the hearing that his well was hand driven to 29 feet. The Leo Morins have very good water and have never run out of water. Mr. Morin is not against the proposed change; however, he does feel that it might affect the production of his well. (Testimony of Leo Morin and Department file and records.)

19. Steven W. and Janice L. Morin stated in their objections that they feel the changed appropriation might take water away from their well. The Morins also stated they feel that Stone wastes too much water. Steven and Janice Morin hold Certificate of Water Right 39959-g76M to appropriate groundwater at a rate of 40 gpm at a point in the NE¼NW¼NW¼ of Section 33, Township 15 North, Range 21 West. The well was hand driven to a depth of 29 feet. The static water level was 12 feet in the fall of 1988. Steve and Janice Morin's well is used for domestic, lawn and garden, and stock. Department file and testimony of Steve Morin.)

20. Steve Morin believes Stone is planning to increase the water usage instead of simply making a change in point of diversion. Mr. Morin believes that moving a point of diversion

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two miles up-gradient constitutes a new water use and Stone should be making Application for a Beneficial Water Use Permit instead of the instant Application to Change Appropriation Water Right. Steve Morin believes that Stone abandoned the water right for Well No. 6 when Stone ceased to use that well in 1984 and physically disconnected the pump in 1985. (Testimony of Steve Morin.)

21. LeRoy Wolff did not state what his objections were on his filed objection; however, Mr. Wolff stated in his written objection that he would agree to the issuance of an Authorization to Change if Stone would be "fully responsible and liable for any lowering of existing water table and or depletion of domestic water usage." LeRoy V. and Shirley J. Wolff hold Certificate of Water Right 26340-g76M for a well located in Parcel A, Lot 4 of Warren Acres Tracts # 2 in the NW¼ of Section 31, Township 14 North, Range 20 West. The well which is 41 feet deep is used at a rate of 30 gpm up to 1.50 acre-feet per year for domestic purposes. The Wolffs also claim an exempt water right for domestic use dating back to 1970, at the same location as the aforementioned well. Objector Wolff stated at the hearing that he did not expect the proposed change to adversely affect his well, but that he was concerned about who would be responsible if his well did cease production. This concern was expressed by each of the objectors at the hearing. (Department file and records and testimony of LeRoy Wolff.)

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22. According to data from the National Counsel for Air and Stream Improvement, a mill similar to Stone's mill uses an average of 10,400 gallons of water per ton. Stone uses 11,500 gallons per ton which is slightly higher than the average, but within ten percent of the average use. Stone reuses water brought into the mill, on the average, twice. Some is used three times while some is used only once. The amount of waste water discharged by Stone has not increased for many years. (Testimony of Larry Weeks.)

23. Stone owns the property where the water will be put to beneficial use. (Department file.)

24. Stone's underlying water right is located in Basin 76M. According to Department records, the adjudication process for Basin 76M has not been completed.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, chapter 2, part 3, MCA.

2. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

3. The Department must issue an Authorization to Change Appropriation Water Right if the Applicant proves by substantial

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credible evidence that the following criteria, set forth in § 85-2-402(2), MCA, are met:

> (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
> (b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.
> (c) The proposed use of water is a beneficial use.
> (d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. The proposed use, industrial, is a beneficial use of water. Mont. Code Ann. § 85-2-102(2)(1899). Stone beneficially uses all the water diverted. See Finding of Fact 22. There is no evidence in the record that Stone is wasting water as alleged by Steve and Janice Morin. See Finding of Fact 19.

5. The Applicant has provided substantial credible evidence that the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 7, 8, 9, 10, 12, 14, and 15. There would be an effect on other water users; however, it would not be an adverse effect. Section 85-2-401(1), MCA, states,

> As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can

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reasonably exercise his water right under the changed conditions. (Emphasis added)

The Objectors' wells are all approximately 29 or 30 feet deep with the exception of Wolff's well which is 41 feet deep. See Findings of Fact 16, 18, 19, and 21. The static water level in the area is approximately 12 feet below ground level. See Findings of Fact 17 and 19. That means there is approximately 17 or 18 feet of water in the shallow wells and approximately 28 feet of water in Wolff's well. The change as it is proposed would lower the groundwater level in the shallow aquifer as much as six-tenths of a foot in the area of the proposed well location. See Finding of Fact 9. All of the Objectors' wells could operate with an additional six-tenths of a foot drawdown. Therefore all Objectors could reasonably exercise their water rights for their wells. See Findings of Fact 9, 15, and 17.

Objector Starlin's irrigation use would be affected by the proposed change. See Findings of Fact 16 and 17. The change would lower the water table in the shallow aquifer and possibly lower the submoisture below the root zone. See Finding of Fact 9 and 16. However, Mr. Starlin did not file a Statement of Claim for subirrigation. Subirrigation rights upon which an objector has not filed a statement of claim are abandoned and are not a basis for objection. See Mont. Code Ann. 85-2-226 (1991). Even if Mr. Starlin had filed a claim for subirrigation, the limit of a subirrigation right is the volume of water necessary to produce a comparable crop utilizing conventional flood or sprinkler irrigation. Moreover, a water user is not entitled to continue

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receiving a volume by means of subirrigation. In re Applications 18845-76LJ and 18846-76LJ by Orem; In re Application 50765-41Q by Nilson Enterprises; In re Application 41255-41B by Allred; In re Application 56173-43D by Shesne; In re Application 68514-41M by Durocher.

Mr. Starlin's intimation that Stone's groundwater use is responsible for the reduction of water availability from the slough is unfounded. See Finding of Fact 16. Evidence in the record indicates a distance of five feet from the bottom of the slough and the shallow water table and that the slough is probably fed by a surface water stream. See Finding of Fact 14. However if, in fact, the slough did penetrate the shallow aquifer, it would not be unreasonable to issue a groundwater permit that might lower the level of the source to the point that it would not be physically available in the slough. In similar situations, the Department's position has been to determine that a well is improperly completed if it only taps an aquifer within the top few feet while the aquifer has sufficient water to satisfy the existing and proposed demand placed upon it. There is no statute or legal precedent to require a different determination when the means of diversion is a slough penetrating only the top of an aquifer. To hold that an appropriator is entitled to maintain, against subsequent appropriators, a certain water level in a slough that barely penetrates the aquifer would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their

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own means of diversion easier. In re Application 31441-41R by McAllister; In re Application 71133-41B by Hildreth; In re Application 72498-76L by Cross.

The change would not draw the contamination from the old location to the proposed site. See Finding of Fact 11 and 12.

Applicant's initial burden of production in a change hearing is discharged by providing an Application, Statement of Claim for the underlying right, and the testimony of witnesses. Objectors then have the burden to go forward producing evidence that the proposed change would adversely affect their water right. Objectors have failed to meet that burden. Both the Applicant and the Objectors have testified to a lowering of the groundwater level. However, the Applicant provided evidence that a lower groundwater level would not cause an adverse effect to the Objectors. None of the Objectors produced any evidence, contrary to the Applicant's evidence, that the groundwater level would be reduced to the point where the Objectors would not be able to exercise their water rights. Weighing Applicant's evidence against the Objectors' evidence, the preponderance of the evidence in the record is that the water rights of prior appropriations will not be adversely affected.

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 6, 8, 12, 13, and 22.

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7. The Applicant has possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 23.

8. Section 85-2-404, MCA, states in pertinent part,

> (1) If an appropriator ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the right or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right shall, to that extent, be considered abandoned and shall immediately expire.
>
> (2) If an appropriator ceases to use all or part of his appropriation right or ceases using his appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for his use, there is a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used.

However, § 85-2-404(5), MCA, states that subsections (1) and (2) do not apply to existing rights until they have been determined in accordance with part 2 of this chapter.[5]

There is nothing in the record to establish that Stone intended to abandon the water right for Well No. 6 in 1984 or 1985 as alleged by Steve Morin. See Findings of Fact 11 and 20. If the Water Court had issued a final decree on Applicant's water rights, the Department could not deem the Applicant's water right abandoned by nonuse until 1994 providing the water right was not exercised at all in that time period and water was available for

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[5] "part 2 of this chapter" addresses the procedure and requirements for the adjudication of water rights by the Montana Water Court.

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its use. However, until a final decree is issued, only the Water Court has jurisdiction to declare a claimed water right abandoned. See Finding of Fact 24.

9. The allegation that moving a water right a distance of two miles should constitute a new appropriation is unfounded. See Finding of Fact 20. There is nothing in the statutes limiting the distance a water right may be moved. As long as the criteria set forth in § 85-2-402, MCA, are met, a water right may be moved any distance.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right G(W)118495-76M is hereby granted to Stone Container Corporation to change the point of diversion of Statements of Claim 118495-76M, 118496-76M, and 118497-76M from the NW¼NE¼NW¼ of Section 24, Township 14 North, Range 21 West to the SE¼SE¼SW¼ of Section 25, Township 14 North, Range 21 West, in Missoula County.

1. This authorization is subject to all prior existing water rights in the source of supply. Further; this authorization is subject to any final determination of existing water rights, as provided by Montana law.

2. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the

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Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

3. This authorization is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

The final completion of the well must include an access port of at least .50 inch so that the static level of the well may be accurately measured.

4. The approval of this change is not to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and § 85-2-404, MCA.

5. Pursuant to Section 85-2-505, MCA, to prevent ground-water contamination, an operational backflow preventer must be installed and maintained by the Appropriator if a chemical or fertilizer distribution system is connected to the well.

6. The combined flow of the Fairbanks Well Field shall not exceed 14,500 gallons per minute.

7. This authorization is subject to the condition that the Appropriator shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be

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recorded. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Missoula Water Resources Regional Office, Holiday Village Professional Plaza Suite 105, P.O. Box 5004, Missoula, MT 59806.

8. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

9. The water rights involved in this Authorization to Change are multiple uses of the same right. The use of the right for several purposes does not increase the extent of the water right. Rather, it allows the right to interchange the purpose of use of the water in accord with historic practices.

10. If, at any time after this authorization is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Appropriator to show why the authorization should not be modified or revoked. The Department may then modify or revoke the authorization to protect existing

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water rights or allow the authorization to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered. The defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objectors on other substantive issues.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 30th day of January, 1992.

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 30th day of January, 1992, as follows:

Stone Container Corp
Drawer D
Missoula, MT 59806

Eugene R. Starlin
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Cindy G. Campbell
Hearings Unit Legal Secretary

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